Petition

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81-1988

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED MOTOR INNS, *Petitioner*,

v.

BVA CREDIT CORPORATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FORMER FIFTH)

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QUESTION PRESENTED

Whether the Court of Appeals in its en banc Opinion erred in concluding that § 5(j) of the Bankruptcy Act, 11 U.S.C. § 23(j), is not inconsistent with the purposes or provisions of Chapter XII of the Bankruptcy Act, 11 U.S.C. §§ 801-926, and is, therefore, not rendered inapplicable to proceedings under Chapter XII by § 402 thereof, 11 U.S.C. § 802, so as to void the discharges of Petitioner's individual general partners and their spouses on partnership debts as a result of the confirmation of Petitioner's Chapter XII Plan of Arrangement.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FORMER FIFTH)

Consolidated Motor Inns, Petitioner herein, prays that a Writ of Certiorari issue to review the en banc judgment of the United States Court of Appeals for the Fifth Circuit (Former Fifth) (hereinafter "the Court of Appeals") entered in the above case on January 22, 1982, reversing and vacating the Opinion of the panel of the Court of Appeals, 632 F.2d 1178, affirming in part the orders of the United States District Court for the Northern District of Georgia entered February 20, 1976 and December 21, 1978, and remanding certain issues to The Court of Appeals panel.

OPINIONS BELOW

The Opinion of the Bankruptcy Court for the Northern District of Georgia, Atlanta Division (hereinafter "the Bankruptcy Court") entered on October 15, 1975, is not reported, either officially or unofficially, but a true copy thereof is attached hereto as part of the Appendix to this Petition (Pet. App. 1a-9a). The Opinion of the District Court entered on February 20, 1976, is not reported either officially or unofficially, but a true copy thereof is attached hereto as part of Petitioner's Appendix

(Pet. App. 10a-15a). The Opinion of the Bankruptcy Court entered on February 14, 1978, is not reported, either officially or unofficially, but a true copy thereof is attached hereto as part of Petitioner's Appendix (Pet. App. 16a-18a). The Opinion of the District Court entered on December 21, 1978, to the knowledge of your Petitioner, is not reported either officially or unofficially, but a true copy thereof is attached hereto as part of Petitioner's Appendix (Pet. App. 19a-21a). The panel Opinion of the Court of Appeals entered December 15, 1980 is officially reported at 632 F.2d 1178. The en banc Opinion of the Court of Appeals entered January 22, 1982, is officially reported at 666 F.2d 189.

JURISDICTION

The en banc judgment of the Court of Appeals, 666 F.2d 189, was entered on January 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions directly involved in this matter. The statutory provisions involved are those contained in Chapter XII of the Bankruptcy Act, 11 U.S.C. § 801-926, and specifically § 5(j), 11 U.S.C. § 23(j), and § 402, 11 U.S.C. § 802. While this case only directly involves a proceeding under the Bankruptcy Act, as will be pointed out hereinafter, the resolution of this issue is also important to the future application of the provisions of the Bankruptcy Code of 1978, 11 U.S.C. §§ 101 et seq., enacted by Congress in 1978 to supplant the Bankruptcy Act.

STATEMENT OF THE CASE

On January 22, 1982, the Court of Appeals, in an en banc Opinion, affirmed in part an Opinion of the District Court entered February 20, 1976, which voided discharges for Peti-

tioner's individual general partners and their spouses on partnership debts as a result of the confirmation of the debtor partnership's Plan of Arrangement in a Chapter XII proceeding. In affirming the 1976 District Court Opinion in part, the Court of Appeals thereby also affirmed the Order of the Bankruptcy Court of February 14, 1978 striking said discharges and the Order of the District Court of December 21, 1978 affirming said Bankruptcy Court Order. The en banc Opinion of the Court of Appeals also had the effect of reversing and vacating an earlier Opinion of a panel of the Court of Appeals which had reversed the lower Court Orders striking said discharges on the ground that § 5(j) of the Bankruptcy Act, 11 U.S.C. § 23(j), was not a bar to the discharges of the individual general partners and their spouses on partnership debts because that provision was inconsistent with the purposes and provisions of Chapter XII of the Bankruptcy Act and, therefore, rendered inapplicable by § 402 thereof, 11 U.S.C. § 802.

Briefly, the factual background surrounding this matter is as follows:

On October 15, 1975, the Bankruptcy Court entered an Order confirming a Plan of Arrangement which had been proposed by your Petitioner in accordance with the provisions of Chapter XII of the Bankruptcy Act, 11 U.S.C. §§ 801-926, and the Rules of Bankruptcy Procedure for Chapter XII. The jurisdiction of the Bankruptcy Court to enter such an Order was founded on the provisions of § 472 of the Bankruptcy Act, 11 U.S.C. § 872.

The Plan of Arrangement proposed by Petitioner contained the following provision:

> "Confirmation of this plan shall act as a bar to any creditor thereafter pursuing any claim it held or alleges to have held on January 23, 1975, against the partnership, the partners thereof or their spouses, arising out of the business of the partnership." (Section 14 of said plan, Page 109 of Petitioner's Appendix in Court of Appeals)

The Order of the Bankruptcy Court dated October 15, 1975 confirming said plan also provided:

> "Ordered, that the discharge provided the Debtor by the confirmation of the arrangement and the conclusion of this proceeding shall extend to the individual general partners and their spouses in regard to any liability of same from debts of the debtor discharged by this proceeding and the confirmation of the arrangement shall act as a full discharge of said debts in regard to any liabilities of said partners or spouses arising out of the operation or business of the debtor. Further, the acceptance, retention or endorsement of any check representing payment under the arrangement by any payee who is a creditor affected by the arrangement shall constitute a full release and discharge of the debtor, its individual general partners and their spouses respectively from any and all claims of whatsoever kind or nature against any or all of them arising out of the business of the debtor . . ." (Pet. App. 6a).

After the entry of the Confirmation Order by the Bankruptcy Court, three creditors, including the Respondent herein, BVA Credit Corporation (hereinafter "BVA"), filed appeals with the District Court from the Confirmation Order. Two of these creditors, including BVA, voluntarily dismissed their appeals and did not pursue them. The third creditor, Brand Development Corporation, pursued its appeal which resulted in the District Court Order of February 20, 1976 (Pet. App. 10a-15a) holding invalid discharges of the partners and their spouses. [1]

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[1] Petitioner had approximately 400 creditors, and no other creditors filed an appeal from the Order of the Bankruptcy Court. In fact, no creditor, other than BVA, refused payment of the consideration tendered under the provisions of the Plan of Arrangement which had been confirmed by the Bankruptcy Court. No creditor sought or received a stay of the Confirmation Order and the plan, including the sale of all the properties of Petitioner, has been fully consummated.

Petitioner appealed the District Court Order of February 20, 1976 to the Court of Appeals, which appeal was resisted by Brand Development Corporation, as Appellee.

While the Appeal by Brand Development Corporation from the Order of the Bankruptcy Court was pending, and continuing during the time the appeal of Petitioner from the Order of the District Court was pending, BVA sought to pursue collection efforts against the partners of Petitioner and their wives based upon purported guarantees of certain equipment leases by said partners and their spouses.

While Petitioner's appeal to the Court of Appeals was pending from the District Court Order of February 20, 1976, Brand Development Corporation transferred its claim against Petitioner to the wholly owned subsidiary of a substantial creditor of Brand, unrelated to Petitioner, its partners or their wives.

Thereafter, on July 14, 1977, the Bankruptcy Court entered an Order approving a settlement between the assignee of Brand Development Corporation's claim and Petitioner, which settlement provided that the claims of Brand Development Corporation against Petitioner would be withdrawn without any payment and a substantial counterclaim which Petitioner had filed against Brand would likewise be dismissed.

Thereafter, pursuant to Rules 43 and 27 of the Federal Rules of Appellate Procedure, the assignee of Brand's claim petitioned the Court of Appeals to be substituted as appellee and further requested that the appeal filed by Petitioner from the Order of the District Court of February 20, 1976 be dismissed as moot.

Petitioner responded to the motion to dismiss its appeal by indicating it had no objection to said dismissal on grounds of mootness, *if, and only if, simultaneously with said dismissal the Court of Appeals directed the District Court to vacate its Order dated February 20, 1976.*

The Court of Appeals entered an Order dismissing Petitioner's appeal as moot but did not order the District Court Order vacated. Counsel for Petitioner thereupon filed a Motion to have the District Court Order of February 20, 1976 vacated, which motion was denied by the Court of Appeals. Petitioner filed an Application for a Writ of Certiorari to the Court of Appeals with this Court on April 5, 1978 which Petition was denied.

On February 14, 1978, the Bankruptcy Court considered the original Order of Confirmation on remand as a result of the Order of the District Court of February 20, 1976. In its Order of February 14, 1978 (Pet. App. 16a-18a) acting on the remand, the Bankruptcy Court ordered the releases and discharges of Petitioner's partners and their spouses stricken from the Order of Confirmation and declared to be of no effect. Petitioner filed a Notice of Appeal to the District Court which, in an Order entered December 21, 1978 (Pet. App. 19a-21a), affirmed the Order of the Bankruptcy Court in all respects.

Petitioner appealed the District Court Order of December 21, 1978 to the Court of Appeals. After oral argument and submission of briefs, the panel of the Court of Appeals issued its Opinion of December 15, 1980, reported at 632 F.2d 1178. This Order restored the discharges for Petitioner's partners and their spouses by holding the District Court erred in concluding that § 5(j), 11 U.S.C. § 23(j), was applicable to proceedings under Chapter XII of the Bankruptcy Act. BVA filed a Motion for Rehearing in the Court of Appeals, with a suggestion for a rehearing en banc. After supplemental briefs were filed by Petitioner and BVA but without further oral argument, the Court of Appeals, in its en banc Opinion, reversed and vacated the panel Opinion by holding that § 5(j) of the Bankruptcy Act, 11 U.S.C. 23(j), was applicable to proceedings under Chapter XII because it was not inconsistent with the purposes or provisions thereof. The en banc Opinion is reported at 666 F.2d 189. Petitioner thereupon filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case presents a clear but important issue in the administration of the Federal Bankruptcy laws — is a Bankruptcy Court, as a matter of law, prohibited from giving effect to provisions contained in a Plan of Reorganization that discharges the owners of the debtor from individual liabilities on the debtor's obligations to its creditors where the assets of said owners are not themselves administered in the proceeding? The issues presented in this particular case are in the context of whether § 5(j) of the Bankruptcy Act prohibits the discharge of the individual general partners and their spouses own a debtor partnership's debts. Petitioner contends, and the panel of the Court of Appeals below concluded, there was no such prohibition because § 5(j) of the Bankruptcy Act was inapplicable to proceedings under Chapter XII because it is inconsistent with the purposes and provisions thereof. The en banc Court of Appeals has reached a contrary conclusion without really analyzing the logic or legislative history behind the analysis contained in the Panel Opinion. As Judges Garza and Roney stated in their dissent to the en banc Opinion:

> "The holding of the majority will forever foreclose the use of the rehabilitative chapters of both the old and the new Bankruptcy Code to partnerships, unless the partners themselves file for Bankruptcy." *In re Consolidated Motor Inns*, 666 F.2d 189, 191 (1982).

This issue is one of first impression in the Supreme Court because this Court has not reviewed any case in which the discharge of partners of a debtor partnership in a Chapter XII proceeding was clearly provided for in a Plan of Arrangement that was confirmed. This Court did decline to grant Certiorari in an appeal from a state court action in which provisions of a Chapter XII Plan of Arrangement previously confirmed in the Bankruptcy Court were held to be a bar against a creditor holding personal guarantees of the debtor partnership's partners enforcing those guarantees in a post-confirmation legal action.

See *Levy* v. *Cohen*, 561 P.2d 252, 256-258 (1977), *cert. denied*, 434 U.S. 833, 54 L.Ed.2d 94, 98 S.Ct. 119 (1977). Petitioner respectfully submits that case establishes, at the very least, that discharges provided for a debtor partnership's partners in a Plan of Arrangement which is confirmed are not void as a matter of law and are enforceable against a creditor holding a personal guarantee of the debtor's partners if that creditor sits idly by and does not contest the provisions of the Plan of Arrangement.

This case presents a similar situation in that BVA did not oppose the confirmation of the debtor's plan in this case at the confirmation hearing and thereafter voluntarily dismissed an appeal from the Confirmation Order. In this particular case, however, an appeal by another creditor resulted in the District Court Order which held § 5(j) of the Bankruptcy Act to prohibit discharges for the Petitioner's individual general partners and their spouses on partnership debts.

This case has been reviewed on two occasions in the District Court and on two occasions in the Court of Appeals. Yet, although the issue was clearly stated in the Panel Opinion of the Court of Appeals, issued December 15, 1980, the en banc Opinion issued January 22, 1982 completely ignores any meaningful analysis of the alleged inconsistency of § 5(j). The most that can be said is that the en banc Opinion simply states the conclusion that § 5(j) of the Bankruptcy Act is applicable to proceedings under Chapter XII without explaining why or undertaking to deal with the rather detailed analysis of the panel on the inconsistency argument.

Petitioner respectfully submits the panel of the Court of Appeals clearly stated the issue and the logic behind its conclusion as follows:

> "The validity of the individual partners' discharges will turn on our decision as to whether a provision of the first seven 'straight bankruptcy' chapters of the Act is applica-

ble to proceedings under Chapter XII, a 'rehabilitative' chapter. The District Court held the discharges to be invalid on the authority of § 5(j), located in the straight bankruptcy chapters at 11 U.S.C. § 23(j). It provides:

> 'The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts.'

CMI argued in the District Court that § 402 of Chapter XII, 11 U.S.C. § 802, renders § 5(j) inapplicable to this proceeding:

> 'The provisions of Chapters 1 to 7 inclusive, of this title, shall, insofar as they are not inconsistent with the provisions of this Chapter, apply to proceedings under this Chapter.'

The crux of CMI's position is that § 5(j) is fundamentally inconsistent with the rehabilitative purpose of Chapter XII.

This inconsistency argument is based upon two general grounds. First, it is argued that while Congress intended that a partnership, standing alone and without the assets of its partners individually, [footnote omitted] could file under Chapter XII, partners would have no incentive to utilize the Chapter where the application of § 5(j) would prevent their individual discharge unless individual assets were made available for distribution. Second, CMI contends that partners, whose consent is required for a partnership Chapter XII filing [footnote omitted], could not reasonably be expected to give their consent where the effect would be to discharge the partnership but continue the liability of the general partners for any deficiency. [footnote omitted] The thrust of the argument is that the scheme of rehabilitation afforded by Congress through Chapter XII is frustrated where the application of a general provision would effectively prevent its use by a partnership alone, as intended by Congress.

> The District Court rejected both asserted grounds of inconsistency. As to the first, it stated that partners would be as likely to submit *their* assets in a Chapter XII proceeding as in any other rehabilitative proceeding, 'simply because their liabilities exceeded their assets and they would very much like to be free of their debts and start anew.' On consideration of the second ground, the Court agreed that a partnership discharge which leaves partners liable for a deficiency when less than 100% of debts are repaid under a plan 'is not very sensible.' The short answer to this problem, in the Court's opinion, was for the partners themselves to file Petitions under Chapter XII. [footnote omitted]
>
> We disagree with the conclusions of the District Court, as we find ample proof of an inconsistency between § 5(j) and Chapter XII to have been shown. Two propositions concerning Chapter XII are undisputed by the parties and the District Court: (1) that a partnership as distinct from its partners may file a Petition under Chapter XII; and (2) that under a plan agreed to by creditors and confirmed by the District Court, less than 100% of the claim of each creditor may be repaid. When § 5(j) is applied as it was by the District Court, one or more of these statutory purposes will be thwarted: The partners are logically compelled to file individually under Chapter XII to obtain a discharge for themselves, for if they do not, they will be individually liable for any deficiency caused by a plan which contemplates repayment of less than 100% of a claim.
>
> We will not construe the Bankruptcy Act in a manner which renders worthless a remedial procedure that Congress obviously intended to afford partnerships and their partners." *In re Consolidated Motor Inns*, 632 F.2d 1178, 1181-1183 (1980)

As Petitioner pointed out in its Brief filed in the Court of Appeals, Congress very clearly intended that one type of plan a debtor partnership could propose in a rehabilitation proceeding was one in which less than 100% of the claims of the debtor partnership would be paid in exchange for the provisions of the

plan. This Congressional intent was made obvious by the following language contained in the report of the United States House of Representatives on the bill which was considered in 1937 to revise the Bankruptcy Act and create Chapter XII:

> "Chapter XII permits the *settlement, satisfaction, or extension of the time of payment of debts* secured by real property or chattels, including the right to obtain relief under the Bankruptcy Act without the necessity of submitting to an adjudication." (emphasis added) House Report 1409, 75th Congress, First Session (July 29, 1937).

With the inconsistency issue extensively argued in the briefs filed in the Court of Appeals, and succinctly but clearly stated in the panel Opinion, it is surprising the en banc Opinion of the Court of Appeals scarcely deals with the argument at all. Instead of analyzing and responding to the arguments of inconsistency and the legislative history of the statute, the en banc Opinion simply announces the conclusion that § 5(j) of the Act is applicable to proceedings under Chapter XII because it is not inconsistent with Chapter XII. A review of the cases cited by the en banc court shows that not only do these cases not address the issue present but perhaps indicate the Court of Appeals, notwithstanding the briefs filed and the panel Opinion, may have misconstrued the issue before the Court. *It should be clearly stated that no argument has been made at any stage of this case that the confirmation of a Chapter XII Plan of Arrangement, as a matter of law, discharges a debtor partnership's partners and their spouses on partnership debts.* Therefore, the decisions of this Court in *Liberty National Bank* v. *Bear*, 276 U.S. 215, 220-21, 48 S.Ct. 252, 253-54, 72 L.Ed. 536 (1928) and *Myers* v. *International Trust Co.*, 273 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692 (1927), cited by the en banc court at Page 190, do not control this case. Petitioner has at no time taken the position that the discharge of a partnership in a bankruptcy proceeding, whether liquidation or rehabilitation, has the effect of discharging the partnership's partners and their

spouses on partnership debts unless said discharges are clearly provided for in the Plan of Arrangement and accepted by the required majorities of creditors. That situation was simply not present in the two Supreme Court cases cited by the en banc court since they involved in the case of *Liberty National Bank* v. *Bear, supra,* a straight bankruptcy proceeding and in the case of *Myers* v. *International Trust Co., supra,* a pre-Chapter XII composition. Neither of these cases involved any Plan of Arrangement providing for any discharges or releases for a debtor's partners or their spouses from partnership debts.

Likewise, all but one of the district court and appellate court opinions cited by the en banc Court of Appeals did not involve a Chapter XII Plan of Arrangement. In *R.I.D.C. Industrial Development Fund* v. *Snyder,* 539 F.2d 487, 494 (5th Cir. 1976) cert. denied, 429 U.S. 1095, 97 S.Ct. 1112, 51 L.Ed.2d 542 (1977), a Chapter XI Plan of Arrangement was involved which purported to affect the rights of secured creditors as well as unsecured creditors and which contained ambiguous langauge to the effect that all remaining unpaid debts after the last distributions under the plan ". . . shall be cancelled, discharged and extinguished." *Id.* at Page 490. Not only did this case present the problem of undertaking to affect secured creditors in a Chapter XI proceeding designed only to deal with the debts of unsecured creditors, but the plan did not contain any clear language purporting to release or discharge that debtor's partners. Under the circumstances, the Court of Appeals held such language did not affect liabilities as a guarantor or co-debtor. *First National Bank* v. *Poland Union,* 109 F.2d 54, 56-57 (2nd Cir.) cert. denied, 309 U.S. 682, 60 S.Ct. 723, 84 L.Ed. 1026 (1940), was a pre-Chapter XII partnership proceeding which did not involve a plan that purported to discharge the individual liabilities of partners. *In re Airport Associates,* 462 F.Supp. 320 (D.Hawaii 1978) did not involve a Chapter XII plan at all but the issue of whether the Bankruptcy Court could stay legal

proceedings against co-makers of notes during Chapter XII proceedings — an issue that is not present in this case.

The only case cited by the en banc Opinion which involves a Chapter XII Plan of Arrangement and the application of § 5(j) thereto is the 1962 decision of the United States Court of Appeals for the 10th Circuit in *Acme Tool, Inc.* v. *Flesher*, 309 F.2d 636. In that Opinion, there is *dictum* which states that ". . . the confirmation of the arrangement and the discharge of the partnership could not, *as a matter of law*, release and discharge the individual partners, none of whom were parties to the Chapter XII proceedings." (emphasis added) *Id.* at 637.

That case, notwithstanding the *dictum*, is clearly distinguishable from the present case in that the Plan of Arrangement in *Acme Tool* did not clearly provide that the debtor's partners would be discharged from the individual liabilities and, in fact, this effect or intent was specifically disavowed in the Appellate Court:

> "The Complaint is that the quoted provision has the effect of discharging the individual general partners for the partnership debts. Counsel for the Trustee expressly disavows such effect and we agree that the Order in question does not eliminate the liability of the general partners for partnership debts." *Id.* at Page 637.

There is no effort in the above case to discuss any alleged consistency or inconsistency in applying § 5(j) of the Act to proceedings under Chapter XII. The issue was simply not analyzed or raised by the provisions of the plan involved in that case or the issues on appeal.

In its en banc Opinion at Pages 190-191, the Court of Appeals clearly misreads *Collier's Treatise on Bankruptcy* when it states that ". . . the partners have the option of filing a Chapter XII Petition on the separate behalf of the partnership or filing jointly on behalf of a partnership and one or more of its general partners." *Collier* clearly states in his *Treatise* that

". . . the joint petition authorized by § 5 of the Act has been abolished by Bankruptcy Rule 105." 9 *Collier on Bankruptcy*, ¶ 9.32, at 433, Footnote 110 (14th Ed. 1978). In addition to the en banc Court being incorrect in stating that a partner and partnership may file a joint Chapter XII Petition, the Court seems clearly to have misconstrued the language contained in *Collier* relating to the effect of a discharge in a Chapter XI proceeding at Page 191 of the en banc Opinion. In that Section of the *Treatise*, the discussion is simply repeating what Petitioner has acknowledged — the confirmation of a Chapter XI plan does not, as a matter of law, discharge any individual liabilities of the debtor partnership's partners on partnership debts. *Collier* does not address in his *Treatise* the question presented in this case of whether discharges for the partners and their spouses, *if clearly set forth in the plan, accepted by the required majorities of creditors and confirmed by the Bankruptcy Court*, are enforceable.

In the present case, the Plan of Arrangement (Exhibit "D" thereto) proposed by your Petitioner required the partners and their spouses and businesses in which they had an interest to forego large claims against the debtor partnership and to convey properties, many of which were held in the individual names of the partners and their spouses, so that the provisions of the plan could be consummated. In exchange for the provisions of the plan, including the discharges and releases for the partners and their spouses, these individuals and businesses in which they had an interest agreed to forego any payment on their debts and give up any individual interests they may have had in the partnership property. This they did and the plan has been fully consummated without any creditor seeking a stay of the provisions of the Plan of Arrangement or the Order Confirming same. Under these circumstances, Petitioner respectfully submits it is fundamentally unfair and inequitable to deprive the partners and their spouses of the releases and discharges clearly

provided in the plan, overwhelmingly accepted by the creditors and found proper by the Bankruptcy Court in its Confirmation Order.

The Federal Courts have recognized that the jurisdiction of the Bankruptcy Court should be liberally construed in reorganization proceedings and releases have been provided to parties whose assets were not being administered when these parties have made payments funding plans or given other consideration. See *Law Research Service, Inc.* v. *Crook*, 524 F.2d 301, 314 (2nd Cir. 1975). The very Court of Appeals below has admonished Bankruptcy Courts in proceedings under the rehabilitative provisions of the Bankruptcy Act to be "reorganization minded" and not "liquidation minded." See *A-Cos Leasing Corporation* v. *Wheless*, 422 F.2d 522, 524 (5th Cir. 1970). And the Federal Courts have not been hesitant to find provisions of the straight Bankruptcy chapters of the Bankruptcy Act inapplicable to proceedings under the rehabilitative chapters where they would tend to thwart or discourage reorganization. See the bank setoff decision of the United States Court of Appeals for the Third Circuit in *Susquehana Chemical Corp.* v. *Producer's Bank & Trust Co.*, 174 F.2d 783, 786-787 (1949) and the Opinion of the United States Court of Appeals for the Second Circuit in *In re Yale Express Systems, Inc.*, 370 F.2d 433 and 384 F.2d 992. The analysis contained in the Panel Opinion in this matter clearly demonstrates the inconsistency of § 5(j) to proceedings under Chapter XII and the discouraging effect the application of same would have to the chances of rehabilitation of partnerships.

CONCLUSION

This case presents an important question concerning bankruptcy law which should be resolved by the Supreme Court. The denial of Certiorari in *Levy* v. *Cohen, supra*, suggests a recognition by this Court that a Chapter XII Court at least has

jurisdiction to approve a plan providing for discharges of a debtor partnership's partners on partnership debts. The en banc Opinion below clearly comes to the opposite conclusion. While there is no provision in the new Bankruptcy Code such as § 5(j), the same result would be reached if the principles of law limiting discharges as stated by the Court of Appeals are valid. Petitioner respectfully submits such a position discourages rehabilitation under the Federal Bankruptcy laws and, if that is to be the result, it should be established and clearly announced at the highest level of the Federal Judiciary. This is a case that squarely and clearly presents the issue and Petitioner respectfully submits that this Court should grant the Petition for Certiorari to the Court of Appeals.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue from this Court.

Respectfully submitted,

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Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No: B75-296A

IN THE MATTER OF:
CONSOLIDATED MOTOR INNS,

Debtor

In Proceedings For An Arrangement
Under Chapter XII

CONFIRMATION OF ARRANGEMENT

An application having been filed herein for the confirmation of Alternative A in the Arrangement proposed by the above named Debtor on the 15th Day of August, 1975, to its creditors under Chapter XII of the Bankruptcy Act, and the same having come on to be heard and duly considered on the 9th Day of October, 1975, upon due notice by mail to all creditors entitled thereto as required by law and pursuant to the order of this Court, and the Court being satisfied and finding based proceedings had before it on said date and on evidence received in other hearings in this matter that the Arrangement should be confirmed and that same is consistent with Chapter XII of the Bankruptcy Act,

And it appearing that said Alternative A proposal in the Debtor's Arrangement has been duly accepted in accordance with the provisions of Chapter XII of the Bankruptcy Act, and that the deposit required by the provisions of said Chapter and by said Arrangement, amounting to Two Hundred Thousand Dollars ($200,000.00) having been deposited with the Clerk of this Court and a further deposit having been made in an amount not less than Five Hundred Thousand Dollars ($500,000.00), subject to the order of the Court, in the First National Bank of Atlanta, a designated depository of this Court, in the Debtor's Chapter XII account and the Debtor having been authorized

by the Court to serve as disbursing agent to distribute the funds required to be distributed under the Arrangement,

And, it appearing that the provisions of Chapter XII have been complied with; and that said proposal is for the best interest of creditors and is feasible and the said Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the said proposal and its acceptance are in good faith, and have not been made or procured by any means, promises or acts forbidden by the Bankruptcy Act; and that all payments made or promised by the Debtor, by any person issuing securities or acquiring property under the Arrangement, or by any other person, for services and for costs and expenses in, or in connection with, this proceeding, or in connection with and incident to the Arrangement, have been fully disclosed to the Court and are reasonable, or, if to be fixed after confirmation of the Arrangement, will be subject to the approval of the Court; and it also appearing that no reclamation proceedings have been filed which should prevent confirmation of the Arrangement, will be subject to the approval of the Court; and it also appearing that no reclamation proceedings have been filed which should prevent confirmation of the Arrangement; it is

ORDERED, that Alternative A of the said Arrangement, hereto annexed and made a part hereof, be and the same hereby is in all respects confirmed, and it is further

ORDERED, that the Debtor is hereby declared free and discharged from all debts and liabilities provided for by the said Arrangement except as otherwise provided for in the said Arrangement or in this Order, excluding such debts as are not dischargeable under Section 17 of the Bankruptcy Act, and the debts of the Debtor's affiliated business entities (Consolidated Motor Inns, a general partnership, Suwanee Properties, a general partnership Consolidated Motor Inns, Inc. and Suwanee Management, Inc.) having been assumed by the Debtor prior to the filing of the petiton in this proceeding and the assets of said entities being included as assets in this proceeding because they came into the possession and operation of the Debtor prior to the filing of the petition in this proceeding, are also discharged subject only to the provisions of this paragraph, and it is further

ORDERED, that the Debtor shall comply with the provisions of the Arrangement and with this order and the other orders of this Court relative thereto, and shall take all action necessary to carry out the Arrangement, and it is further

ORDERED, that the title to the Debtor's property, real and personal, which is to be transferred in accordance with said provisions, and said property so transferred shall be free and clear of all debts affected by the Arrangement, except such debts as may otherwise be provided for in the Arrangement or in this Order, or in any other order directing or authorizing the transfer of such properties, and it is further

ORDERED, that the motel properties owned and operated by the Debtor and located at Suwanee, Georgia, Nashville and Lebanon, Tennessee, Zephyrhills and Port Richey, Florida, and Montgomery and Tuscaloosa, Alabama, shall be transferred to the Imperial Motels Corp. in accordance with that certain contract of sale attached to the Debtor's Arrangement as Exhibit "A." Upon the payment by said Imperial Motels Corp. of the sales price set forth in said contract of sale ($300,000.00) and, upon said transfer, said Imperial Motels Corp. shall hold said motel properties free and clear of all liens and encumbrances except for the first or second mortgages thereon and chattel financing agreements thereon as respectively set forth on Exhibit "H" to said contract of sale, a copy of which is attached hereto, and Exhibit "I" to said contract of sale, a copy of which is attached hereto, or on such other terms and conditions as may be set forth in any additional or separate understanding or agreement between said Imperial Motels Corp. and the mortgagee or chattel creditors of the Debtor, or any of them, or on the basis set forth hereinafter, and it is further

ORDERED, that the terms and conditions of the transfer of the Debtor's motel property at Montgomery, Alabama, in regard to the existing first mortgage against said property held by First Pennsylvania Mortgage Trust shall be as set forth in Paragraph 4(a)(1) of that certain contract of sale which is Exhibit "A" to said Arrangement, namely, the repayment terms for the loan now held by First Pennsylvania Mortgage Trust and secured by a first mortgage on said Montgomery motel property shall be such that the principal and

interest of said loan shall be payable in monthly payments of Ten Percent (10%) per annum based on Twenty-Five (25) year terms, except that on the seventh anniversary of said loan as provided in this confirmation the remaining unpaid principal and accrued interest shall be due and payable in a "balloon" payment but, provided further, Imperial Motels Corp. shall have the option to further extend the terms of said loan beyond said seven year term for an additional five years during which the unpaid principal shall be amortized in quarterly payments of principal and interest at Ten Percent (10%) per annum and said Imperial Motels Corp. shall assume and be liable for payments on said loan as herein provided, or, said Imperial Motels Corp. shall assume and be liable to pay said loan on any other and different terms to which said Imperial Motels Corp. and First Pennsylvania Mortage Trust may agree, and it is further

ORDERED, that the Debtor, Imperial Motels Corp. and the creditors of the Debtor and all other necessary parties execute and deliver, or join in the execution and delivery of whatever instruments may be necessary to effect the foregoing transfer of the Debtor's motel properties and to effect the transfer of any other of the Debtor's properties which the Arrangement provides will be transferred, and it is further

ORDERED, that all liens, except those mortgages, deeds to secure debt and chattel liens described on Exhibits "H" and "I" to that certain contract of sale attached to the Arrangement as Exhibit "A," copies of which are attached hereto, against the Debtor's motel properties be and the same hereby are satisfied, cancelled and terminated upon tender of payment to said creditors as provided in the Arrangement, and said creditors be, and they hereby are, directed to execute any and all documents necessary to reflect the satisfaction, cancellation and termination of said liens, and it is further

ORDERED, that distribution be made in accordance with said Arrangement to the creditors having scheduled or allowed claims and that the discharge of the Debtor as to the debt of any creditor is made subject to said distribution to said creditor in accordance with the provisions of said Arrangement, and the Debtor shall act as disbursing agent for said distributions and the balance of any deposit required

by this Court, if any, after all of said distributions have been made shall be withdrawn by check payable to the Debtor, and it is further

ORDERED, that all unpaid administrative expenses approved by this Court be paid within ten days after this Order or in the event of fees or compensation which are not fixed within said time, then within five days from the date of such determination, and it is further

ORDERED, that the Arrangement and its provisions shall be binding upon the Debtor and all creditors of the Debtor, whether or not they are affected by the Arrangement, or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable, but the confirmation of the Arrangement and the discharge from this proceeding shall not be deemed a satisfaction, termination, or novation as to the security interests held by any creditor in any of the motel properties of the Debtor as set forth on Exhibits "H" and "I" to the contract of sale which is Exhibit "A" to the Arrangement, copies of which are attached hereto and it is further

ORDERED, that a copy of this confirmation be filed in the proper office of any county in which real property of the Debtor being transferred under the Arrangement is located as evidence of the satisfaction of any and all liens and encumbrances against said property not specifically preserved by the Arrangement and this confirmation order, and it is further

ORDERED, that the objection of First Pennsylvania Mortgage Trust to the division of creditors into classes as set forth in the Arrangement be, and the same hereby is, denied and the Court finds that in the context of this Chapter XII proceeding it is a reasonable division of creditors to place all creditors holding mortgages against the motel properties of the Debtor in one class regardless of the particular motel property which constitutes security for any one of said creditors and whether said creditors hold construction of permanent loans from the Debtor and this finding is made, in part, because of the presence of a number of construction lenders in the mortgagee class and because of the prolonged negotiations between the Debtor, Imperial Motels Corp. and said creditors to reach, in the case of each creditor, a reasonable basis upon which to preserve the interest of

each of said mortgagee creditors against the property of the Debtor which constitutes the security for the obligations to each of said creditors which obligations are being assumed by or the property is being taken subject to said obligations by Imperial Motels Corp., and it is further

ORDERED, that all creditors affected by the terms of the Arrangement be and they hereby are forever restrained and enjoined from taking any further action or proceeding in connection with their said claims, or proceeding to execute or enforce any judgment previously obtained, except to enforce the consummation of the terms of the Arrangement as confirmed herein, and it is further

ORDERED, that the discharge provided the Debtor by the confirmation of the Arrangement and the conclusion of this proceeding shall extend to the individual general partners and their spouses in regard to any liability of same from debts of the Debtor discharged by this proceeding and the confirmation of the Arrangement shall act as a full discharge of said debts in regard to any liabilities of said partners or spouses arising out of the operation or business of the Debtor. Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payee who is a creditor affected by the Arrangement shall constitute a full release and discharge of the Debtor, its individual general partners and their spouses respectively from any and all claims of whatsoever kind or nature against any or all of them arising out of the business of the Debtor but shall be without force or effect as to the liability of any individual general partner of the Debtor or his spouse to any such creditor where such liability arises out of an indebtedness incurred other than in the operation or business of the Debtor, and it is further

ORDERED, that parties in interest may file objections to the allowance of any claim heretofore scheduled or filed but not allowed or disallowed, within thirty (30) days from the date hereof, and such objections and all objections heretofore filed herein shall be brought on for hearing within sixty (60) days from the date hereof, unless previously noticed for hearing; and notice of such hearing shall be given to the claimant at least five (5) days prior to the date fixed therefor; upon failure to so file objections or to notice objections for

hearing as herein provided, the objection to the claim affected thereby shall be deemed waived, and it is further

ORDERED, that sixty (60) days from the date said check is mailed to the creditor entitled to same, or within such further time as the Court may allow, the Debtor shall stop payment of any such checks then upaid, and shall deposit by certified check the amount of such unpaid checks with the Clerk of this Court together with a list of the persons entitled thereto and the respective amounts due such persons, and it is further

ORDERED, that within seventy (70) days after the date the last check has been mailed to a creditor in this proceeding entitled to receive same under the Arrangement or within such further time as the court may allow, the Debtor shall file with this Court a verified report showing compliance herewith, together with all cancelled vouchers and supporting bank statements showing disbursement of all funds deposited pursuant to the provisions of said Chapter XII and the Arrangement herein, and it is further

ORDERED, that this Court shall retain jurisdiction until the provisions of the Arrangement have been performed.

SO ORDERED at Atlanta, Georgia this 15th day of October, 1975.

/s/ W. HOMER DRAKE, Bankruptcy Judge

CONSOLIDATED MOTOR INNS
FIRST AND SECOND MORTGAGES

Motel	Mortgagor	Type Loan	Principal Balance	Monthly Payment	Interest Rate	Years	Unpd. Interest As of 10/1/75
Days Inn Motel & Tasty World Rest. and Gas Sales Facilities 180 Units N. side Southern Blvd., E of I-65 Montgomery, Montgomery Co. Ala.	First Pa. Mortgage Trust	Construction	$1,336,500	$11,694 Interest Only	Prime + 3½%		$249,507
Days Inn 152 Units U.S. 82 By-Pass at I-20/I-59 Tuscaloosa, Tuscaloosa Co., Ala.	Birmingham Trust	Construction	$1,140,000	$ 11,163 Interest Only	Prime + 4¾%		$163,835
	First National Bank of Tuskaloosa	Second Mortgage	$ 150,000	$ 7,500 per Qtr. Prin. Only	Prime + 2%	5	$ 17,118
Days Inn Motel & Tasty World Rest. I-40 & U.S. 231 - S/E Quadrant Lebanon, Tennessee, Wilson County	Home Federal Savings and Loan	Permanent	$ 914,306	$ 9,046	10%	25 15 Year Term Balloon	$ 83,319
Ramada Inn - Restaurant - Lounge Lawrenceville - Suwanee Road 106 Units Suwanee, Georgia	Atlanta Federal Savings and Loan	Permanent	$ 784,114	$ 7,198	9%	20	$ 80,262
Days Inn - Tasty World Rest. and Gas Sales Facilities 150 Units 3.3 Acres NE Quadrant I-40 & Old Hickory Blvd. Nashville, Davidson County, Tenn.	Home Federal Savings and Loan	Permanent	$1,115,299	$10,228	10%	25 (15-Yr. Term Balloon	$ 95,013
	Third National Bank	Second Mortgage	$ 225,000	$ 4,875	10% Add-on	5	$ 13,558
Days Inn, Tasty World Restaurant and Gas Sales Facilities 122 Units NW Quadrant of I-75 and S.R. 54 Pasco Co. (Zephyrhills), Fla.	Clearwater Federal Savings and Loan	Permanent	$ 964,722	$ 9,097	9½%	20	$ 90,995
Days Inn Lodge, Tasty World Rest. and Gas Sales Facilities 106 Motel Units - 16 Motel Efficiency Units and 36 Lodge Units East Side of U.S. 19	Clearwater Federal Savings and Loan	Construction	$1,234,370	$ 9,772 Interest Only	9½%	25	$124,648

CONSOLIDATED MOTOR INNS
CHATTELS AND ADVERTISING CONTRACTS

Motel	Lessor	Property Or Service	Effective Date	Expiration Date	Term	Monthly Payment	Past Due Amount As of 10/1/75
Days Inn Motel & Tasty World Rest. and	C & S Leasing	Telephone	3/10/74	3/10/84	10 Years	$ 680	$ 6,366.06
Gas Sales Facilities	C & S Leasing	Furniture	7/23/74	7/23/79	5 Years	$4,238	$52,900.08
180 Units	1st Nat'l St. Bank N.J.	Televisions	11/19/73	11/19/80	7 Years	$1,110	$12,217.37
N. side Southern Blvd., E of I-65	Capital Advertising	Advertising			2 Years	$ 500	$ 7,022.08
Montgomery, Montgomery Co., Ala.	National Advertising	Advertising			3 Years	$ 500	$ 1,690.00
Days Inn	1st Nat'l St. Bank N.J.	Televisions	1/11/74	1/11/81	7 Years	$ 952	$10,470.57
152 Units	Creative Displays	Advertising	1/1/74	1/1/77	3 Years	$ 775	$ 3,675.00
U.S. 82 By-Pass at I-20/I-59							
Tuscaloosa, Tuscaloosa Co., Ala.							
Days Inn Motel & Tasty World Rest.	Walter Heller & Co.	Advertising			5 Years	$ 450	$ 4,500.00
I-40 & U.S. 231 - S/E Quadrant	B V A	Furniture	1/10/74	1/10/79	5 Years	$2,521	$22,689.45
Lebanon, Tennessee, Wilson County	1st Nat'l St. Bank N.J.	Televisions	1/11/74	1/11/81	7 Years	$ 753	$ 8,282.78
Ramada Inn - Restaurant - Lounge	Nat'l Equip. Rental	Telephone	4/20/73	4/20/83	10 Years	$ 685	$ 6,164.73
Lawrenceville - Suwanee Road	C & S Leasing	Furniture	3/10/74		5-7 Years	$4,943	$54,370.03
106 Units	Outdoorable	Advertising	2/27/73	2/27/76	3 Years	$ 737	$ 5,892.00
Suwanee, Georgia	Liberty Heath	Advertising	1973	1983	10 Years	$ 298	$ 1,788.00
Days Inn - Tasty World Rest. and Gas	Walter Heller & Co.	Advertising	2/8/74	2/8/79	5 Years	$ 825	$ 8,250.00
Sales Facilities	1st Nat'l St. Bank N.J.	Televisions	11/19/73	11/19/80	7 Years	$ 940	$10,335.05
150 Units 3.3 Acres	B V A	Furniture	1/10/74	1/10/79	5 Years	$2,801	$25,207.92
NE Quyadrant I-40 & Old Hickory Blvd.	U C Leasing	Telephone	12/20/73	12/20/83	10 Years	$ 606	$ 6,138.40
Nashville, Davidson County, Tenn.							
Days Inn, Tasty World Restaurant and	Westinghouse Credit	Telephone	2/20/74	2/20/84	10 Years	$ 548	$ 5,480.80
Gas Sales Facilities	B V A	Furniture	6/14/74	6/14/79	5 Years	$3,635	$32,715.54
122 Units	1st Nat'l St. Bank N.J.	Televisions	11/19/73	11/19/80	7 Years	$ 758	$ 8,334.26
NW Quadrant of I-75 and S.R. 54	National Advertising	Advertising	11/16/73	11/16/76	3 Years	$ 438	$ 2,264.53
Pasco Co. (Zephyrhills), Fla.							
Days Inn Lodge, Tasty World Rest. and	Motorola	Televisions	2/11/74	2/11/81	7 Years	$ 940	$ 9,395.80
Gas Sales Facilities	Morris & Associates	Advertising			1-3 Years	$ 215	$ 497.45
106 Motel Units - 16 Motel Efficiencies							
and 36 Lodge Units							
East Side of U.S. 19							
Port Richey, Pasco Co., Florida							

EXHIBIT "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No: B75-296A

IN THE MATTER OF:
CONSOLIDATED MOTOR INNS,

Debtor

ORDER

The instant case is submitted to this Court on appeal from an order of the Bankruptcy Court entered on October 15, 1975, confirming the Debtor's Plan of Arrangement and from the notice of confirmation of the Plan and Discharge entered on October 21, 1975.

On January 23, 1975, Consolidated Motor Inns (the Debtor-Appellee), a Georgia limited partnership, filed its Chapter XII petition, 11 U.S.C. § 801 *et seq.*, in this proceeding and, on that date, was continued in the possession and operation of its properties as a Debtor-in-Possession. The Debtor-Appellee filed its Plan of Arrangement on August 15, 1975, and the hearing on confirmation was held on October 9, 1975, and the hearing on confirmation was held on October 9, 1975. At the hearing the Bankruptcy Court found that the requisite majorities required for confirmation of the Plan in each class of creditors had been obtained and, adter finding that the Plan was in the best interest of creditors, the Plan of Arrangement was confirmed.

On March 3, 1975, the Appellant, Brand Development Corp., who had served as the general contractor for the construction of all but one of the Debtor-Appellee's motel properties, filed a claim in this proceeding. The Appellant contended that it was a secured creditor as a result of certain materialmen's liens arising out of work performed on the motels owned by the Debtor-Appellee. The Debtor-Appellee filed an objection to this claim, and on October 8, 1975, the Bankruptcy Court disallowed Appellant's claim in its entirety for voting

purposes but without prejudice to Appellant's right to share in distribution under any Plan of Arrangement confirmed, if, upon a hearing on the merits, Appellant could establish that it had a valid claim in excess of any valid counterclaim of the Debtor-Appellee.

The Plan of Arrangement as confirmed concludes with the following language:

> "Confirmation of this Plan shall act as a bar to any creditor thereafter pursuing any claim it held or alleges to have held on January 23, 1975, against the partnership, the partners thereof or their spouses, arising out of the business of the partnership."

The order of confirmation dated October 15, 1975, from which this appeal is taken, provides in part as follows:

> "ORDERED, that all creditors affected by the terms of the Arrangement be and they hereby are forever restrained and enjoined from taking any further action or proceeding in connection with their said claims, or proceeding to execute or enforce any judgment previously obtained, except to enforce the consummation of the terms of the Arrangement as confirmed herein, and it is further
>
> ORDERED, that the discharge provided the Debtor by the confirmation of the Arrangement and the conclusion of this proceeding shall extend to the individual general partners and their spouses in regard to any liability of same from debts of the Debtor discharged by this proceeding and the confirmation of the Arrangement shall act as a full discharge of said debts in regard to any liabilities of said partners or spouses arising out of the operation or business of the Debtor. Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payee who is a creditor affected by the Arrangement shall constitute a full release and discharge of the Debtor, its individual general partners and their spouses respectively from any and all claims of whatsoever kind or nature against any or all of them arising out of the business of the Debtor but shall be without force or effect as to the liability of any individual general partner of the Debtor or his spouse to any such creditor where such liability arises out of an indebtedness incurred other than in the operation or business of the Debtor,
>
> . . .

In accordance with the provisions of the Plan of Arrangement, the sale of the Debtor-Appellee's motel properties was closed on November 25, 1975. In connection with the sale the individual partners and their respective spouses joined in the documents of conveyance as required by the order of confirmation.

The instant appeal is the only appeal from the order of confirmation being prosecuted by any creditor. The Appellant's statement of record and issues on appeal outlined four (4) issues. The Court apprehends that the controlling issue in this case is the permissibility or authority of the Bankruptcy Court to confirm a Plan of Arrangement and include in that confirmation a discharge of the general partners and their spouses when only the limited partnership filed the Chapter XII petition and when only the assets of the limited partnership were administered in the proceeding.

Resolution of the issue in this case centers on the applicability of Section 5(j) of the Bankruptcy Act, 11 U.S.C. § 23(j), to a proceeding under Chapter XII, 11 U.S.C. § 801 *et seq.*

Section 5(j) of the Bankruptcy Act provides:

> "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts."

Under this section it is perfectly clear that the discharge in ordinary bankruptcy of a partnership entity does not affect the individual liability of the general partners. *Liberty National Bank* v. *Bear*, 276 U.S. 215, 222 (1928); *In the Matter of Jercyn Dress Shop*, 379 F. Supp. 1119 (E.D. N.Y. 1974), *affirmed* 516 F.2d 864 (2nd Cir. 1975); *Young* v. *Riddell*, 283 F.2d 909 (9th Cir. 1960); *Schram* v. *Wrubel* 38 F. Supp. 357 (E.D. Mich. 1941); *see generally* 1 A *Collier on Bankruptcy* ¶ ¶ 5.01, 5.15. Thus, the partnership trustee cannot prevent the partnership creditors from obtaining *in personam* judgments against the individual partners on unpaid partnership debts. *See First National Bank of Herkimer* v. *Poland Union*, 109 F.2d 54 (2nd Cir. 1940), *cert. denied*, 309 U.S. 682 (1940). However, it is the contention of the Debtor-Appellee that this section is inapplicable to a Chapter XII proceeding.

Section 402 of Chapter XII, 11 U.S.C. § 802, provides in part:

> "The provisions of chapters 1 to 7, inclusive, of this title, shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter:. . . ."

The Debtor-Appellee contends that Section 5(j) of the Bankruptcy Act is inconsistent with the provisions and purposes of Chapter XII, and, therefore, inapplicable in this proceeding.

The Debtor-Appellee argues that the inconsistency of Section 5(j) and Chapter XII lies in the inherent difference between the objective of straight bankruptcy, i.e., liquidation, and a Chapter XII proceeding, i.e., rehabilitation. Thus, the Debtor-Appellee argues that the general partners of a partnership would have no incidence to utilize Chapter XII if their individual liability may not be discharged unless the assets of the partners themselves are made available for distribution. Further, the Debtor-Appellee argues that to allow the partnership to be discharged and, yet, continue the liability of the general partners for any deficiency, would hardly make sense in a statute triggered by the voluntary act of the general partners.

The Court disagrees. As to the first point, the general partners are just as likely to submit their assets to the Bankruptcy Court in Chapter XII proceeding as in any other rehabilitative proceeding. The reason that they would do so is simply because their liabilities exceed their assets and they would very much like to be free of their debts and start anew. And as the Debtor-Appellee points out, the purpose of a Chapter XII proceeding is rehabilitation and there is at least some possibility in a Chapter XII proceeding that the general partners will be allowed to continue to operate their assets under a plan of arrangement and make a success of what was a failing enterprise. Indeed, the Alternative B Plan of Arrangement in the instant case would have allowed continuation by the general partners. Thus, the incentive to utilize Chapter XII under these circumstances is the same as for any of the other rehabilitative sections of the Bankruptcy Act — the continuation of an enterprise free of overburdening debts. The alternative to such an arrangement under Chapter XII is, of course, straight bankruptcy.

Next, the Debtor-Appellee argues that it would hardly make sense for the partnership to be discharged in a Chapter XII proceeding and leave the general liable for the deficiency. The Court agrees that such an outcome is not very sensible. However, the answer is not to allow the general partners to be discharged but to allow them to also file petitions under Chapter XII. While Bankruptcy Rule 105 abolishes the provisions of Sections 5(a) and (b) of the Bankruptcy Act, 11 U.S.C. § 23(a) and (b), allowing a joint petition, Rule 117(b) permits joint administration under these circumstances. *See generally* 8 *Collier on Bankruptcy* ¶ 4.02[4_____.] (Chapter XI). Thus, the Debtor-Appellee's proposed inconsistency is seen not to exist.

This Court is not the first court to be presented with this issue. In *Acme Tool, Inc.* v. *Flesher*, 309 F.2d 636 (10th Cir. 1962), a partnership filed a voluntary petition under Chapter XII and an arrangement was confirmed. The individual partners werre not parties to the Chapter XII proceeding.

> "The complaint is that the quoted provision has the effect of discharging the individual general partners from the partnership debts. Counsel for the Trustees expressly disavows such effect and we agree that the order in question does not eliminate the liability of the general partners for partnership debts.
>
> The Bankruptcy Act provides that the discharge of a partnership does not discharge the individual general partners from the partnership debts. This provision is not inconsistent or in conflict with Chapter 12 and applies to proceedings thereunder. Hence, the confirmation of the arrangement and the discharge of the partnership could not as a matter of law release and discharge the individual partners, none of whom were parties to the Chapter 12 proceedings."
>
> 309 F.2d at 636.

See also Ellis v. *Yumen*, 324 F. Supp. 1314, 1319, (D. Hawaii 1971) (applying Section 5 to Chapter XII without discussion). This Court is in complete agreement, and thus the discharge of the limited partnership in this case did not discharge the general partners and their spouses.

Therefore, on the basis of the foregoing, the purported discharges of the general partners and their spouses and the injunction entered pursuant thereto are void and of no effect. This case is remanded to the Bankruptcy Court for disposition consistent with this opinion.

IT IS SO ORDERED.

This 20th day of February, 1976.

/s/ JAMES C. HILL
James C. Hill
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. B75-296A

IN THE MATTER OF:
CONSOLIDATED MOTOR INNS,

Debtor

In Proceedings For An Arrangement Under Chapter XII

ORDER

On appeal of the above styled matter to the District Court specific provisions of the Confirmation of Arrangement which discharged the individual general partners and their spouses, were held to be void and of no effect. The District remanded the case to the Bankruptcy Court. This Order is to comply with the remand and modify the Confirmation of Arrangement consistent with the District Court's February 20, 1976 Order.

The Order of the District Court went to the issue whether the Bankruptcy Court had the authority to discharge general partners and their spouses when only the limited partnership had filed a Chapter XII petition and only the assets of the limited partnership were administered in the bankruptcy proceeding.

The District Court determined that 5(j) of the Bankruptcy Act, 11 U.S.C. 23(j) as applied by 402 of Chapter XII, 11 USC 802, was controlling as this section provides:

> "The discharge for a partnership shall not discharge the individual general partners thereof from the partnership debts. A general partner ajudicated a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts."

The District Court determined that the discharge in Bankruptcy of the partnership under Chapter XII of the Bankruptcy Act did not

effect the individual liability of the general partners and their spouses, notwithstanding the rehabilitative aspect of a Chapter XII proceeding. Partnership creditors could not be prevented from obtaining *in personam* judgments against the individual partners and their spouses on unpaid partnership debts.

The District Court determined for the individual partners and their spouses to take advantage of Chapter XII they must file petitions with the Bankruptcy Court and undergo the joint administration of their respective estates with the partnership estate.

The District Court determined that as none of the individual general partners and their spouses had filed petitions they were not parties to this Chapter XII proceeding, their purported discharges and the injunctions entered against their creditors were void and of no effect.

On the basis of the determinations and the remand contained in the District Court's order of February 20, 1976 it is hereby:

ORDERED, that the Bankruptcy Court has no jurisdiction to discharge or enjoin the creditors of the non-petitioning individual general partners or their spouses, further

ORDERED, that the provisions of the Plan of Arrangement and the Confirmation of Arrangement applying to the non-petitioning individual general partners and their spouses are striken, to wit:

> "Confirmation of this Plan shall act as a bar to any creditor thereafter pursuing any claim it held or alleges to have held on January 23, 1975, against the partnership, the partners thereof or their spouses, arising out of the business of the partnership."
>
> * * *
>
> "ORDERED, that all creditors affected by the terms of the Arrangement be and they hereby are forever restrained and enjoined from taking any further action or proceeding in connection with their said claims, or proceeding to execute or enforce any judgment previously obtained, except to enforce the consummation of the terms of the Arrangement as confirmed herein, and it is further
>
> ORDERED, that the discharge provided the Debtor of the confirmation [sic] of Arrangement and the conclusion of this proceeding shall extend to the individual general partners and

their spouses in regard to any liability of same from debts of the Debtor discharged by this proceeding and that the confirmation of the Arrangement shall act as a full discharge of the debts in regard to any liabilities of said partners or spouses arising out of the operation or business of the Debtor. Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payment under the Arrangement by any payee who is a creditor affected by the Arrangement shall constitute a full release and discharge of the Debtor, its individual general partners and their spouses respectively from any and all claims of whatever so kind or nature against any or all of them arising out of the business of the Debtor but shall be without force or affect as to the liability of any individual general partner of the Debtor or his spouse to any such creditor where such liability arises out of an indebtedness incurred other than in the operation or business of the Debtor, . . ."

ORDERED, that all unnegotiated checks representing payment under the Arrangement be voided and reissued with no restrictive endorsement, further

ORDERED, that the reissued checks representing payment under the Arrangement be in the amount made certain by the Order of Confirmation dated October 15, 1975 plus interest at seven (7) percent per annum from October 15, 1975, further

ORDERED, that the Plan of Arrangement and Confirmation of Arrangement be striken of all provisions enjoining the creditors and discharging the individual partners and their spouses, further

ORDERED, that all orders of this Court pertaining to the non-petitioning individual general partners and their spouses are declared void and of no effect.

ORDERED, that the Debtor's Plan of Arrangement, as modified above, is confirmed.

DATED at Atlanta, Georgia this 14 day of January, 1978.

/s/ HUGH ROBINSON
Hugh Robinson
Bankruptcy Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Bankruptcy Case No. 75-296A

IN THE MATTER OF:
CONSOLIDATED MOTOR INNS

ORDER

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December 19, 1978

Consolidated Motor Inns (CMI), debtor and appellant herein, has appealed a bankruptcy order entered February 14, 1978 in this Chapter XII bankruptcy proceeding, 11 U.S.C. § 801 *et seq*. The February 14, 1978 order was entered by United States Bankruptcy Judge Hugh Robinson pursuant to this court's order of February 20, 1976, (Hill, J.).

Our February 20, 1976 order held that under Section 5(j) of the Bankruptcy Act, 11 U.S.C. § 23(j), the discharge of a partnership in Chapter XII proceedings does not discharge the individual partner from partnership debts. Because only CMI, a limited partnership, and not its individual partners had filed bankruptcy petitions, we ruled that the discharges of the CMI partners and the injunctions entered against their creditors were void.

CMI appealed to our February 20, 1976 order to the Fifth Circuit Court of Appeals. The appeal was contested by Brand Development Corporation, one of CMI's creditors. Following a settlement of claims between CMI and Alias Enterprises, Inc., to whom Brand had transferred its claim against CMI, the Fifth Circuit dismissed the appeal. The court did not, however, grant CMI's motion to order this court to vacate the 1976 order.

On February 14, 1978, Bankruptcy Judge Robinson entered the order now in dispute. The appellant objects to those provisions of the February 14 decree which require (1) that all unnegotiated checks representing payment under the Arrangement be voided and reissued with no restrictive endorsement; (2) that all reissued checks include interest at seven percent per annum from October 15, 1975, the date of the Order of Confirmation; and (3) that all provisions discharging the individual partners and their spouses, and enjoining creditors of individual partners and spouses, be stricken from the Plan of Arrangement and Confirmation of Arrangement. In addition, appellant charges that the February 14 order ought not to have been entered because (1) the Court of Appeals should have vacated the 1976 order upon determining that the appeal of that order was to be dismissed, and (2) this court was incorrect in holding that a Chapter XII proceeding brought by a partnership will not allow for discharge of the partners' debts. [1]

The appellant's latter two arguments are easily answered. The court perceives no valid no reason to reconsider its 1976 order, which was entered after full argument by all parties concerned. CMI has cited, and we have found no authority contrary to the 1976 ruling, *c.f., R.I.D.C. Industrial Development Fund* v. *Snyder*, 539 F.2d 487, 494 (1976), *cert. denied*, 429 U.S. 1095 (1977). It is not for this court, or the bankruptcy judge, to review decisions of the Fifth Circuit, or to proceed according to what the Court of Appeals "should" have done.

Turning to the specifically challenged provisions of the February 14 order, we believe that each is not only proper, but in fact required under the terms of our 1976 order. The restrictive endorsement that is to be stricken from the reissued checks states:

> Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payee who

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[1] CMI originally contended that the February 14 order was prematurely entered because CMI has petitioned the United States Supreme Court for a writ of certiorari on the grounds that the Court of Appeals should have vacated the 1976 order when dismissing the appeal. As the Supreme Court has denied certiorari, CMI concedes that this point is now moot.

> is a creditor affected by the Arrangement shall constitute a full release and discharge of the debtor, its individual general partners and their spouses respectively from any and all claims of whatever so kind or nature against any or all of them arising out of the business of the debtor. . . .

Clearly it would now be improper to attach this condition to the acceptance of payment by a creditor.

Next, we agree with appellees that CMI's creditors have had a right to payment under the Plan since its confirmation on October 15, 1975, and that Judge Robinson's February 14 order correctly provided that interest be paid from that date. Finally, we perceive no ambiguity or overbreadth in the Bankruptcy Judge's ruling that particular provisions in the Plan of Arrangement and the confirmation of discharging general partners and their spouses are to be stricken. This ruling does not, as CMI suggests, eliminate *all* references to general partners and their spouses, or prohibit their compliance with other portions of the Arrangement.

In sum, we find that the February 14, 1978 order correctly complies with the order of February 20, 1976, and must now be AFFIRMED.

Accordingly, the court AFFIRMS the Order of the Bankruptcy Court entered February 14, 1978.

IT IS SO ORDERED, this 18th day of December, 1978.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
United States District Judge

Supplemental Appendix

81-1988

Office - Supreme Court, U.S.
FILED
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED MOTOR INNS, *Petitioner*,

v.

BVA CREDIT CORPORATION, *Respondent*.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FORMER FIFTH)

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

United States Court of Appeals,
Fifth Circuit*

No. 79-1240

In the Matter of CONSOLIDATED MOTOR INNS,

Debtor.

CONSOLIDATED MOTOR INNS,

Appellant,

v.

BVA CREDIT CORPORATION,

Appellee.

Jan. 22, 1982

Before GODBOLD, *Chief Judge;* BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A CLARK, WILLIAMS and GARWOOD, *Circuit Judges.***

VANCE, *Circuit Judge:*

This case comes before the en banc court for reconsideration of the panel's holding that there is an inconsistency between Chapter XII of the "old" Bankruptcy Act, 11 U.S.C. § 906 et seq., and section 5(j) of that Act, 11 U.S.C. § 23(j). [1]

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

**Hill, Circuit Judge, was disqualified and did not participate in this case. Judge Ainsworth participated in the argument and consideration of the case but because of his death on December 22, 1981 did not participate in the decision.

[1] As the panel opinion noted, this proceeding is governed by the Bankruptcy Act of 1898, which was repealed in 1978 and replaced by the current version of Title 11. Citations in the opinion are to the 1898 Act, as found in the 1976 edition of the United States Code.

The facts are set forth in detail in the vacated opinion of the panel at 632 F.2d 1178 (5th Cir. 1980). We repeat them only to the extent required to pose the issue before us.

Consolidated Motor Inns (CMI), a Georgia limited partnership, filed a petition in the bankruptcy court under Chapter XII. In due course CMI proposed a "Plan of Arrangement" that won approval of an overwhelming majority of its creditors. The plan provided that confirmation would bar all claims by CMI's creditors against the partners and their spouses for debts arising out of the partnership business and required that checks issued to partnership creditors bear a restrictive endorsement stating that acceptance by the payee released CMI, its partners and their spouses. BVA Credit Corporation, a creditor that had not assented to the plan, refused the tendered check and appealed to the district court.

The district court invalidated the discharge of individual partners and their spouses and on remand the bankruptcy court ordered all uncashed checks reissued without the restrictive endorsement. CMI's appeal to this court from the district court's affirmance of that action of the bankruptcy court resulted in the vacated panel opinion that reversed the district court. The panel held that the district court erred in striking the discharges of the individual partners and their spouses as provided in the confirmed plan because the panel concluded that section 5(j) is inconsistent with Chapter XII and therefore inapplicable.

Section 5(j), which is found in the "old" Act's straight bankruptcy chapters, provides:

> The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts.

11 U.S.C. § 23(j). In a straight bankruptcy under this statute discharge of a partnership clearly does not have the effect of discharging nonpetitioning individual partners. *Liberty National Bank* v. *Bear*, 276 U.S. 215, 220-21, 48 S.Ct. 252, 253-54, 72 L.Ed. 536 (1928).

Section 4.02 of Chapter XII, which governs this proceeding, provides:

> The provisions of chapters 1 to 7 of this title, shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter. . . .

11 U.S.C. § 802.

We disagree with the holding of the panel that the provisions are inconsistent and find that the partners and their wives, as individuals, were not discharged under the plan the creditors approved. In reaching this conclusion we follow language of the tenth circuit in *Acme Tool, Inc.* v. *Flesher*, 309 F.2d 636 (10th Cir. 1962):

> The Bankruptcy Act provides that the discharge of a partnership does not discharge the individual general partners from the partnership debts. This provision is not inconsistent or in conflict with Chapter 12 and applies to proceedings thereunder. Hence, the confirmation of the arrangement and the discharge of the partnership could not as a matter of law release and discharge the individual partners, none of whom were parties to the Chapter 12 proceedings.

Id. at 637 (footnotes omitted). *See also Myers* v. *International Trust Co.*, 273 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692 (1927) (composition with creditors in bankruptcy proceeding against partnership does not discharge personal liability of partners as endorsers on partnership note); *R.I.D.C. Industrial Development Fund* v. *Snyder*, 539 F.2d 487, 494 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095, 97 S.Ct. 1112, 51 L.Ed.2d 542 (1977) (Chapter XI arrangement does not discharge guarantor's liability to creditor); *First National Bank* v. *Poland Union*, 109 F.2d 54, 56-57 (2d Cir.) (pre-Chandler Act partnership reorganization plan does not operate to discharge individual partner), *cert. denied*, 309 U.S. 682, 60 S.Ct. 723, 84 L.Ed. 1026 (1940); *In re Airport Associates*, 462 F.Supp. 320 (D.Hawaii 1978) (creditor entitled to proceed against individual partners as comakers of notes during partnership's Chapter XII proceedings.).

The Collier treatise on bankruptcy notes that partners have the option of filing a Chapter XII petition on the separate behalf of the partnership or filing jointly on behalf of a partnership and one or more of its general partners. 9 Collier on Bankruptcy ¶ 4.02, at 833 (14th

ed. 1978). In a discussion concerning a partnership's Chapter XI petition, which we conclude is equally applicable to a Chapter XII petition, Collier also says:

> Section 371 discharges only the "debtor" from the debts specified in that section. If a petition if filed by a partnership in its separate behalf, only the partnership is the debtor and therefore only the partnership as such is discharged from the debts falling within § 371. The individual general partners, not being the debtors in the case, are not discharged from their individual debts, nor are they discharged from the partnership debts. But a general partner who files a Chapter XI petition in his separate behalf may be discharged from both his partnership and individual debts if they come within the terms of § 371.

Id. at ¶ 9.32[10] (footnotes omitted).

We therefore hold that debts of nonpetitioning individual partners [2] to nonassenting creditors cannot be discharged by a partnership's plan under Chapter XII.

To this extent we affirm the district court's decision. We remand to the panel for further consideration of CMI's alternative contentions in the light of our holding.

AFFIRMED IN PART, REMANDED TO PANEL IN PART.

GARZA, *Circuit Judge*, with whom RONEY, *Circuit Judge* joins, dissenting:

I still adhere to the view expressed in our panel opinion at 632 F.2d 1178 (5th Cir. 1980) that there is an inconsistency between Chapter XII of the "old" Bankruptcy Act, 11 U.S.C. § 906, et seq., and section 5(j) of that Act, 11 U.S.C. § 23(j). The holding of the majority will forever foreclose the use of the rehabilitative chapters of both the old and the new Bankruptcy Code to partnerships, unless the partners themselves file for bankruptcy. I do not believe that this was the intent of the Congress in passing both the old and the new Bankruptcy Act.

The majority of my brethren have spoken, and I must accede to their judgment.

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[2] Under the facts of this case our holding also applies to the spouses of the nonpetitioning individual partners

United States Court of Appeals,
Fifth Circuit

No. 79-1240

In the Matter of CONSOLIDATED MOTOR INNS,

Debtor,

CONSOLIDATED MOTOR INNS,

Appellant,

v.

BVA CREDIT CORPORATION,

Appellee.

Dec. 15, 1980

Before COLEMAN, Chief Judge, RONEY and GARZA, *Circuit Judges.*

GARZA, *Circuit Judge.*

We have before us a case and an issue which, on a previous appeal, arrived and departed without resolution. On this appeal, we will consider the case and decide the issue.

On January 23, 1975, the appellant, Consolidated Motor Inns [CMI], a Georgia limited partnership, filed a petition under Chapter XII of the "old" Bankruptcy Act, 11 U.S.C. § 906 *et seq.*[1] Our appellee was one of approximately four hundred creditors. The proceedings were long and involved, generating a docket sheet of some forty-one pages.

On August 15, 1975, CMI proposed a "Plan of Arrangement" governing the treatment of claims made by this multitude of creditors. It set out the terms of payment, and provided for either the continued

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[1] This proceeding is governed by the Bankruptcy Act of 1898, repealed in 1978 and replaced by the current version of Title II. *See* 11 U.S.C. § 403(a), current version. All citations in this opinion will be made to the 1898 Act.

operation of CMI or the disposition of all its property. We are told that the plan received the overwhelming support of the creditors.

A hearing was held before the bankruptcy court on October 9th to consider the plan, and on October 15th that court entered an order confirming it. Pursuant to the order, checks were issued in payment to all creditors. Those returned or not claimed were paid into the registry of the district court.

Among the terms of the plan was the following provision:

> Confirmation . . . shall act as a bar to any creditor thereafter pursuing any claim it held or alleges to have held on January 23, 1975, against the partners thereof or their spouses, arising out of the business of the partnership.

It was also provided that checks issued in payment would bear a restrictive endorsement to the effect that "acceptance, retention or endorsement . . . by any payee who is a creditor affected by the arrangement shall constitute a full release of the Debtor, its individual general partners and their spouses . . ." BVA Credit Corporation, our appellee on this appeal, is a creditor of the general partners and their spouses through contracts of individual guaranty executed by those partners and spouses, whereby they unconditionally guaranteed payment of an equipment lease contract entered by CMI. BVA did not assent to the plan of arrangement, and refused the payment tendered to it pursuant to the order of confirmation.

Three creditors appealed to the district court from that order, challenging the validity of the above-quoted provisions: BVA, the First Pennsylvania Mortgage Trust, and Brand Development Corporation. BVA and First Pennsylvania dismissed their appeals, but Brand proceeded. It was rewarded with an order of the district court invalidating the discharge of the individual partners and their spouses. The court reasoned that where the individual partners had not themselves filed under Chapter XII, they had no standing to receive a discharge as contemplated by the plan of arrangement and order of confirmation.

CMI appealed to this court. While the appeal was pending, however, Brand assigned its claim against CMI to a third party, and the

assignee dismissed its claim against CMI in exchnge for the debtor's dismissal of a substantial counterclaim. The assignee then filed a motion here for substitution of the parties and dismissal of the appeal on the ground of mootness. CMI stated that it would agree to a dismissal if the order of the district court was vacated. This court dismissed the appeal without vacating the order below, and denied CMI's subsequent motion to vacate. The debtor unsuccessfully petitioned the Supreme Court for certiorari.

After the appellate process was inconclusively terminated, the bankruptcy court took up the district court's order and remand, which had been left intact. Pursuant to that order, it voided any discharge of the individual partners, and required that all unnegotiated checks be voided and reissued without restrictive endorsement, bearing interest at the rate of 7% per annum from October 15, 1975.

CMI appealed this order to the district court, which affirmed it in all respects. We are now confronted with an appeal from that judgment. It was stated on oral argument that the issue of the validity of the discharges or releases of the CMI partners and their spouses is the last to be disposed of in this matter. Awaiting our resolution of the issue is a suit brought by BVA against the partners and spouses for a deficiency judgment on the contracts of individual guaranty entered with BVA.

On this appeal, CMI contends (1) that the bankruptcy court erred in strictly applying the remand order of the district court in view of the manner in which this court disposed of the first appeal; (2) that the original district court order voiding the discharges or releases was erroneous; (3) that the bankruptcy court erred by requiring unnegotiated checks to be reissued without restrictive endorsement on remand; and (4) that the bankruptcy court erred in ordering interest paid on the unnegotiated checks.

BVA responds that the disposition of the first appeal was proper, and that the bankruptcy court acted correctly in its implementation of the original district court order after the first appeal was terminated. While the appellee has not briefed the validity-of-discharge issue on the merits, it does specifically rebut CMI's argument that the order to reissue checks without endorsement and with interest was erroneous.

REMAND AFTER THE FIRST APPEAL

By complaining that the bankruptcy court erred in strictly applying the district court's remand order after the first appeal was terminated, CMI in essence attacks this court's refusal to vacate the district court order at the same time that the first appeal was dismissed as moot. We can only construe this argument as urging that the bankruptcy court should have concluded that the court of appeals was wrong, and that it should have refused to apply the remand order on that basis.

The refusal to vacate is called an "extreme departure" from the federal appellate practice of vacating a lower court order where the appeal from it has been dismissed on the ground of mootness. *See United States* v. *Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *Brownlow* v. *Schwartz*, 261 U.S. 216, 43 S.Ct. 263, 67 L.Ed. 620 (1923); *Lebus* v. *Seafarers' International Union*, 398 F.2d 281 (5 Cir. 1968).

We will not decide whether or not the panel which considered the first appeal was correct in refusing to vacate, as, in any event, we cannot overturn a decision made by another panel. *See Cavett* v. *Ellis*, 578 F.2d 567, 569 (5 Cir. 1978); *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 546 (5 Cir. 1976); *Davis* v. *Estelle*, 529 F.2d 437, 441 (5 Cir. 1976). It is manifestly apparent that the bankruptcy court did not err in applying a district court order left intact after appeal, and that the district court did not err in affirming the bankruptcy court's application of it. The bankruptcy court could hardly ignore the remand by deciding that the court of appeals was incorrect in refusing to vacate the district court order; in our system, lower courts do not reverse higher ones.

While we do not decide that the original district court order should have been vacated as a matter of appellate policy and reverse the orders before us on that ground, we are not precluded from taking up the validity-of-discharge issue where it is presented by this appeeal. CMI asks us to consider an order applying a lower-court order never passed on by this court, and asserts that the holding of the original order was erroneous. Under these circumstances, we have the authority to examine the original ruling, and, if we find it indeed erroneous, to reverse the order applying it which is before us. We will according-

ly proceed to determine whether the district court was correct in holding the discharge of the individual partners and their spouses to be invalid on its first consideration of this case.

VALIDITY OF THE DISCHARGES

The validity of the individual partners' discharges will turn on our decision as to whether a provision of the first seven "straight bankruptcy" chapters of the Act is applicable to proceedings under Chapter XII, a "rehabilitative" chapter. The district court held the discharges to be invalid on the authority of § 5(j), located in the straight bankruptcy chapters at 11 U.S.C. § 23(j). It provides:

> The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts.

CMI argued in the district court that § 402 of Chapter XII, 11 U.S.C. § 802, renders § 5(j) inapplicable to this proceeding:

> The provisions of chapters 1 to 7 inclusive, of this title, shall, insofar as they are not inconsistent with the provisions of this chapter, apply to proceedings under this chapter.

The crux of CMI's position is that § 5(j) is fundamentally inconsistent with the rehabilitative purpose of Chapter XII.

This inconsistency argument is based upon two general grounds. First, it is argued that while Congress intended that a partnership, standing alone and without the assets of its partners individually,[2] could file under Chapter XII, partners would have no incentive to utilize the chapter where the application of § 5(j) would prevent their

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[2] The definition of "debtor" in Chapter XII, 11 U.S.C. § 806(6) makes it clear that a partnership, as distinct from its individual partners, can file a petition under the chapter:

> (6) "debtor" shall mean a person, other than a corportation as defined in this title, who could become a bankrupt under section 22 of this title, who files a petition [sic] under this chapter and who is the legal or equitable owner of real property or a chattel real which is security for any debt, but shall not include a person whose only interest in property

individual discharge unless individual assets were made available for distribution. Second, CMI contends that partners, whose consent is required for a partnership Chapter XII filing, [3] could not reasonably be expected to give their consent where the effect would be to discharge the partnership but continue the liability of the general

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proposed to be dealt with by the arrangement is a right to redeem such property from a sale had before the filing of such petition;

11 U.S.C. § 22 provides, at subsection (a):

> (a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt.

§ 23 provides, by subsection (b):

> (b) A petition may be filed by one or more or all of the general partners in the separate behalf of a partnership or jointly in behalf of a partnership and of the general partner or partners filing the same: *Provided, however*, That where a petition is filed in behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent. A petition may be filed separately against a partnership or jointly against a partnership and one or more or all of its general partners.

[3] Bankruptcy Rule 12-8 provides:

> A petition may be filed pursuant to Rule 12-6 or 12-7 by all the general partners on behalf of the partnership.

The Advisory Committee's note on Rule 12-8 reads:

> A partnership as such is a debtor capable of being bankrupt under § 4 of the Act [section 22 of this title] and thus is entitled to the benefit of Chapter XII [Chapter 12 of this title] pursuant to § 406(6) [section 806(6) of this title]. There is some question within the Act whether or not a partnership petition may properly be filed be less than all of the general partners. Under § 5 of the Act [section 23 of this title] and Bankruptcy Rule 105 a petition commencing a bankruptcy case may be filed be less than all of the general partners. This procedure, however, is more akin to an involuntary petition, requiring service of the petition on nonassenting partners and a hearing on adjudication, which is inconsistent with the voluntay nature of a Chapter XII case for arrangement. This rule requires a petition on behalf of a partnership to be filed by all of the general partners. This does not mean, necessarily, that all of the general partners physically execute the petition. While all must consent to the petition, less than all must execute the petition which would be on behalf of all. See 9 Collier 4.02 (1963).

partners for any deficiency.[4] The thrust of the argument is that the scheme of rehabilitation afforded by Congress through Chapter XII is frustrated where the application of a general provision would effectively prevent its use by a partnership alone, as intended by Congress.

The district court rejected both asserted grounds of inconsistency. As to the first, it stated that partners would be as likely to submit *their* assets in a Chapter XII proceeding as in any other rehabilitative proceeding, "simply because their liabilities exceeded their assets and they would very much like to be free of their debts and start anew." On consideration of the second ground, the court agreed that a partnership discharge which leaves partners liable for a deficiency when less than 100% of debts are repaid under a plan "is not very sensible." The short answer to this problem, in the court's opinion, was for the partners themselves to file petitions under Chapter XII.[5]

We disagree with the conclusion of the district court, as we find ample proof of an inconsistency between § 5(j) and Chapter XII to have been shown. Two propositions concerning Chapter XII are undisputed by the parties and the district court: (1) that a partnership as distinct from its partners may file a petition under Chapter XII; and (2) that under a plan agreed to by creditors and confirmed by the district court, less than 100% of the claim of each creditor may be

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[4] CMI gives the following example of how the district court ruling would affect the individual partners. Two alternatives, A and B, were posed by the plan of arrangement. Alternative A was the plan eventually confirmed by the Bankruptcy Court. Under A, CMI has sold its motel properties, and paid various classes of creditors less than 100% of their claims. Under B, CMI would have continued operating, and have paid less than 100%. CMI notes that the creditors in class XII would receive 60% of their claim under A, and 40% under B. The individual partners, once their discharges had been nullified, would then be personally liable for a 40% deficiency under A, and 60% under B.

[5] The district court took note:

> While Bankruptcy Rule 105 abolishes the provisions of Sections 5(a) and (b) of the Bankruptcy Act, 11 U.S.C. § 23(a) and (b) allowing a joint petition, Rule 117(b) permits joint administration under these circumstances.

repaid. When § 5(j) is applied as it was by the district court, one or more of these statutory purposes would be thwarted: the partners are logically compelled to file individually under Chapter XII to obtain a discharge for themselves, for if they do not, they will be individually liable for any deficiency caused by a plan which contemplates repayment of less than 100% of a claim.

We will not construe the Bankruptcy Act in a manner which renders worthless a remedial procedure that Congress obviously intended to afford partnerships and their partners. Noting the difference between "liquidation-minded" proceedings under the straight Bankruptcy chapters and "re-organization-minded" administration via the rehabilitative chapters, federal courts have not hesitated in refusing to apply provisions of the former to actions under the latter where inconsistencies arise from these divergent purposes. *See, e.g., Susquehanna Chemical Corp.* v. *Producer's Bank & Trust Co.*, 174 F.2d 783, 786-87 (3 Cir. 1949) (Right of setoff under 11 U.S.C. § 108(a) held inconsistent with provisions of the rehabilitative chapters). Having found § 5(j) to be inconsistent with the terms of Chapter XII, we hold that the district court erred under § 402 in applying it to this case, and in striking the discharges agreed to by the creditors under the confirmed plan. [6]

Our holding that the discharges were valid necessitates reversal of the Bankruptcy Court's order on remand as to the reissue of checks

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[6] We are aware of no other case squarely addressing this issue. While the district court cited two cases as holding § 5(j) applicable to Chapter XII, we find neither to be in point. In *Acme Tool Incorporated* v. *Flesher*, 309 F.2d 636 (10 Cir. 1962), a partnership filed a voluntary petition under Chapter XII and an arrangement was confirmed. It contained no language purporting to discharge the partners. The case was cited for the following language:

> The complaint is that the quoted provision has the effect of discharging the individual general partners from the partnership debts. Counsel for the Trustees expressly disavows such effect and we agree that the order in question does not eliminate the liability of the general partners for partnership debts.
>
> The Bankruptcy Act provides that the discharge of a partnership does not discharge the individual general partners from the partnership debts. This provision is not inconsistent or in conflict with Chapter 12 and applies to proceedings thereunder. Hence, the confirmation of the

without restrictive endorsement, and with interest. The discharges, approved by a large majority of the creditors, were valid from the date the plan was confirmed, and related issues in this case must be resolved on that basis. We remand the cause to the Bankruptcy Court for proceedings consistent with our opinion.

REVERSED AND REMANDED.

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arrangement and the discharge of the partnership could not as a matter of law release and discharge the individual partners, none of whom were parties to the Chapter 12 proceedings." 309 F.2d at 636.

Obviously, the court was merely holding that the discharge of a partnership filing alone under Chapter XII did not, as a matter of law, discharge the parties. Our case, involving a plan containing a discharge-of-partners provision, is a completely different situation. The general comment that § 5(j) would apply to a Chapter XII proceeding was mere dicta, and we find it unpersuasive.

Ellis v. *Yumen*, 324 F.Supp. 1314 (D.C. 1971), is wholly irrelevant. That district court held that certain provisions of § 5 other than § 5(j) were applicable to Chapter XII.

Opposition

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No. 81-1988

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED MOTOR IINS, *Petitioner*,

v.

BVA CREDIT CORPORATION, *Respondent*.

BVA CREDIT CORPORATION'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FORMER FIFTH)

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Bankruptcy Court has the authority to confirm a Plan of Arrangement and include in that confirmation the discharge of the individual general partners and their nonpartner spouses when only the limited partnership filed a petition under Chapter XII of the Bankruptcy Act and when only the assets of the limited partnership were administered in the bankruptcy proceeding.

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Liberty Bank v. *Bear*, 276 U.S. 215, 220-21, 48 S.Ct. 252, 253-54, 72 L.Ed. 536 (1928)	5
Myers v. *International Trust Co.*, 237 U.S. 380, 47, S.Ct. 372, 71 L.Ed. 692 (1927)	5
R.I.D.C. Industrial Development Fund v. *Snyder*, 539 F.2d 487, 494 (5th Cir. 1976), cert. denied 429 U.S. 1095, 97 S.Ct. 1112, 51 L.Ed.2d. 542 (1977)	5
BANKRUPTCY ACT:	
11 U.S.C. § 23(j)	3, 4
11 U.S.C. §§ 801-926	2, 4
11 U.S.C. § 802	4
11 U.S.C. § 806(6)	4
11 U.S.C. § 872	2
11 U.S.C. § 874	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1988

CONSOLIDATED MOTOR INNS, *Petitioner*,

v.

BVA CREDIT CORPORATION, *Respondent*.

BVA CREDIT CORPORATION'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FORMER FIFTH)

BVA Credit Corporation, Respondent herein, prays that the Petition for a Writ of Certiorari of the Petitioner, Consolidated Motor Inns, which seeks review of an en banc Opinion of the United States Court of Appeals for the Fifth Circuit (Former Fifth) (hereinafter "Court of Appeals") be denied. The reasons why certiorari should not be granted are as follows:

COUNTERSTATEMENT OF THE CASE

I.

In its Statement of the Case, Petitioner states that the Court of Appeals improperly affirmed an Opinion of the District Court entered February 20, 1976. That issue is improperly raised in the petition *sub judice*. This Honorable Court, on May 30, 1978, denied Consolidated Motor Inns' petition for certiorari in

Case No. 77-1418 as to the issue whether the February 20, 1976 District Court Order should have been vacated. Therefore, as Petitioner states that it is actually appealing an Opinion of the District Court entered February 20, 1976, the petition should be dismissed as *res judicata*.

II.

By a 22 to 2 en banc Opinion, the Court of Appeals, on January 22, 1982, affirmed in part a December 21, 1978 District Court Opinion which affirmed a February 14, 1978 Bankruptcy Court Order. That Bankruptcy Court Order was entered as a result of the February 20, 1976 District Court Opinion which voided the discharges of the Petitioner's nonpetitioning general partners and their nonpetitioning, nonpartner wives.

These nonpetitioning parties, although they did not submit themselves or their assets to the jurisdiction of the Bankruptcy Court, were included in an October 15, 1975 Confirmation of Arrangement which resulted from the Petitioner's Chapter XII Arrangement, brought pursuant to 11 U.S.C. §§ 801-926 and the Rules of Bankruptcy Procedure for Chapter XII. Contrary to §§ 472 and 474 of the Bankruptcy Act, 11 U.S.C. §§ 872 and 874, the Petitioner, a Georgia limited partnership, did not include, in its Arrangement under Chapter XII, the proper parties or their property in order to have the individual, nonpetitioning general partners or their nonpetitioning, nonpartner wives included in the discharge of the partnership. Only the partnership filed a petition. Only partnership property was administered by the Bankruptcy Court.

Respondent does not contest the discharge of Petitioner's partnership entity. Respondent's contention, which has been upheld by the courts below, is that parties who have not petitioned for relief under the Bankruptcy Act cannot, as a matter of law, be afforded relief under the Bankruptcy Act. The Bankruptcy Court has no jurisdiction to grant relief to debtors or

bankrupts who have not petitioned the Bankruptcy Court or submitted their assets to the Bankruptcy Court for administration.

Respondent did not assent to Petitioner's plan of arrangement and refused the dividend check issued pursuant to the Confirmation of Arrangement. Those dividend checks carried a restrictive endorsement which stated that the acceptance by the Respondent payee released the Petitioner, its individual partners and their wives. Thereby, the nonpetitioning parties, in whose interest this appeal is being prosecuted, were not contractually released from their individual guaranty of the Petitioner's indebtedness to the Respondent.

Petitioner's primary contention is that §5 (j) of the Bankruptcy Act, 11 U.S.C. § 23(j), is fundamentally inconsistent with the rehabilitative purposes of Chapter XII. However, in the case *sub judice*, there was no rehabilitation. Petitioner ceased doing business on or about the time the Confirmation of Arrangement was entered. For all practical purposes, Petitioner was liquidated, not rehabilitated.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied as there is no conflict between the Court of Appeals' en banc decision and the decisions of this Court or the decisions of the circuits. Further, the en banc decision is in full accord with the principles expressed in the decisions of this Court and with the Congressional purpose expressed in the Bankruptcy Act and the new Bankruptcy Code.

Incorrectly, Petitioner contends that the issue presented is whether a Bankruptcy Court, as a matter of law, is prohibited from giving effect to plan of reorganization provisions that discharge the owners of the debtor from the individual liabilities on the debtor's obligations to creditors when the assets of said owners are not themselves administered in the bankruptcy

proceeding. Petitioner's contention is incorrect as it confuses the terms ownership and debtor. The only debtor in the instant proceeding was the Petitioner. That partnership entity had particular debts and property and was, by § 406(6) of the Bankruptcy Act, 11 U.S.C. § 806(6), made a person for the purpose of bankruptcy administration. The Petitioner, as a separate entity, distinct from each partner, was separately administered by the Bankruptcy Court.

In the case *sub judice*, the nonpetitioning individual partners and their nonpartner wives entered into separate contracts of guaranty with the Respondent. Neither these guaranty contracts nor the assets of the nonpetitioning parties were administered by the Bankruptcy Court. The Court of Appeals found "that the partners and their wives, as individuals, were not discharged under the plan the creditors approved." (Pet. App. 25a) In making its finding, the Court of Appeals pointed to Section 402 of Chapter XII, which provides in pertinent part:

> "The provisions of chapters 1 to 7 of this title, shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter. . . ."

11 U.S.C. § 802. The Court of Appeals determined that there was no inconsistency between Chapter XII of the Bankruptcy Act, 11 U.S.C. § 801, *et seq.* and § 5(j) of that Act, 11 U.S.C. § 23(j), as § 5(j) provides:

> "The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts."

The Court of Appeals found, as a matter of law, that the partners and their wives, as individuals, were not discharged under the plan the creditors approved. In reaching its decision,

the Court of Appeals followed *Acme Tool, Inc.* v. *Flesher*, 309 F.2d 636, 637 (10th Cir. 1962), which states:

> "The Bankruptcy Act provides that the discharge of a partnership does not discharge the individual general partners from partnership debts. This provision is not inconsistent or in conflict with Chapter 12 and applies to proceedings thereunder. Hence, the confirmation of the arrangement and the discharge of the partnership could not as a matter of law release and discharge the individual partners, none of whom were parties to the Chapter 12 proceedings."

The Court of Appeals' en banc Opinion held "that debts of nonpetitioning individual partners [footnote omitted] to nonassenting creditors cannot be discharged by a partnership's plan under Chapter XII." (Pet. App. 26a) The Court of Appeals' en banc Opinion is not in conflict with the decisions of this Court, the decisions of other circuit courts and decisions of district courts. The Court of Appeals followed decisions which, when dealing with both "straight" bankruptcies and rehabilitation cases, make it clear that nonpetitioning parties who do not submit themselves or their assets to the Bankruptcy Court's jurisdiction are not to be discharged in bankruptcy on their individual guaranties. *Liberty Bank* v. *Bear*, 276 U.S. 215, 220-21, 48 S.Ct. 252, 253-54, 72 L.Ed. 536 (1928); *Myers* v. *International Trust Co.*, 237 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692 (1927); *R.I.D.C. Industrial Development Fund* v. *Snyder*, 539 F.2d 487, 494 (5th Cir. 1976), cert. denied 429 U.S. 1095, 97 S.Ct. 1112, 51 L.Ed.2d. 542 (1977); *First National Bank* v. *Poland Union*, 109 F.2d 54, 56-57 (2nd Cir. 1940), cert. denied 309 U.S. 682, 60 S.Ct. 723, 84 L.Ed. 1026 (1940); *In re Airport Associates*, 462 F. Supp. 320 (D. Hawaii 1978).

CONCLUSION

The holding of the Court of Appeals in its en banc Opinion is in accord with the decisions of this Court and with the Congressional purpose manifested in the Bankruptcy Act and the Bankruptcy Code. Bankruptcy law requires parties seeking relief from their debts and obligations to petition for such relief. In the case *sub judice* the co-debtors of the Petitioner have not filed petitions in bankruptcy. As a matter of law, these nonpetitioning parties have no standing to be included in the discharge of the Petitioner partnership.

WHEREFORE, Respondent prays the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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